No. 25-1208

In the

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY CO.,
Petitioner,

v.

ROBERT WILLMORE MALLORY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Commerce Clause forbids a State's assertion of jurisdiction over a nonresident company for out-of-state conduct alleged by a nonresident plaintiff.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as amicus curiae to urge this Court to recognize constitutional limits for state claims of personal jurisdiction. *Mallory v. Norfolk Southern R. Co.*, 600 U.S. 122 (2023).

INTRODUCTION AND SUMMARY OF ARGUMENT

It's sometimes said that the Constitution protects no particular economic system. But text and history both put the lie to that claim.

The Constitution's interlocking provisions—bolstering property rights, barring unlawful confiscations, authorizing a single bankruptcy code, guaranteeing due process, and (most relevant here) denying the States from abridging interstate commerce—protect *markets*. And not just any market-based system, but a nationwide market in goods and services. The result has been an "extraordinary . . . record of progress." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 404 (2023) (Kavanaugh, J., concurring in part and dissenting in

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. Counsel of record for all parties received timely notice of WLF's intent to file this brief.

part). The Constitution has "facilitated robust economic activity within the United States and has helped generate remarkable (albeit at times uneven) economic prosperity and growth in America relative to the other nations of the world." *Id.*

This was no accident. "Under the Articles of Confederation, commerce between the States had been shackled by local prejudice and mutual distrust." Charles J. Cooper & Howard C. Nielson, Jr., *Complete Diversity and the Closing of the Federal Courts*, 37 Harv. J.L. & Pub. Pol'y 295, 304 (2014). Businesses thrive in a legal regime of certainty and predictability. By writing protections for "a truly national," *id.* at 305, market-based economic system into "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, the Framers ensured that the foundations of American prosperity couldn't be extinguished by a simple vote of Congress or a singular act by a state government.

To that end the Framers vested Congress with exclusive power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8. And since only "powers not delegated to the United States by the Constitution . . . are reserved to the States," U.S. Const. amend. X, while the States retain their police powers, the Constitution forbids them from regulating interstate commerce. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 514 (2019).

When this case was last here, this Court determined that "requiring out-of-state corporations to consent to in-state suits"—even if brought by out-of-staters—as a condition of business registration

doesn't violate the Fourteenth Amendment's due process guarantee. 600 U.S. at 130; *id*. at 146. But it left open the question of whether that rule can be reconciled with the dormant aspect of the Commerce Clause. *Id*. at 150–163 (Alito, J., concurring).

That decision has undermined business certainty across the Nation. Pennsylvania's statute at least offers the courtesy of upfront notice that registration unleashes the powers of the Commonwealth's courts. But some States read generic business registration provisions (ones with no mention of jurisdiction) as consents to personal jurisdiction—citing *Mallory* as support. *Minn. v. Am. Petroleum Inst.*, 2026 WL 192130 (Minn. Ct. App. Jan. 26, 2026). There's not much "fair play" in assuming silence is consent. *Int'l Shoe v. State of Wash.*, 326 U.S. 310, 316 (1945) (internal quotation marks and citation omitted).

With such a uniform rule, everyone (except the plaintiff's bar) would at least be equally miserable. But some States have rejected those theories. *E.g.*, *Kelchner v. CRST Expedited Inc.*, 29 N.W.3d 315, 319 (Iowa 2025). And the worst scenario arrived in Connecticut, where the federal and state judiciaries are now at loggerheads on this very question. *Compare O'Leary v. Brook Haven Props., LLC*, 2025 WL 2701908 at *4 (Conn. Super. Ct. Sept. 16, 2025) (finding implied consent to jurisdiction) *with Sociedad Concesionaria Metropolitana Du Salud S.A. v. Webuild S.P.A.*, 2026 WL 84524 at *6 (D. Conn. Jan. 12, 2026) (holding the opposite).

So the law since this Court's ruling in *Mallory* has been chaotic and uncertain. This may not be of

constitutional moment under the Due Process Clause—but it does trigger the "'negative' aspect of the Commerce Clause." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988). Consent-by-registration "unduly restrict[s] interstate commerce," *Tenn. Wine & Spirits*, 588 U.S. at 514, because it violates the Constitution's covenant with "investors and commercial enterprises" that they may "cross state lines with confidence" in the legal landscape of "a truly national economy." Cooper & Neilson 304–05. The Court should grant the writ to cashier consent-by-registration and usher in a predictable and constitutional regime.

This case is also the right vehicle to clear up doctrinal uncertainty about the Commerce Clause that has festered since this Court's fractured application of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) in *National Pork Producers Council v. Ross*. While seven justices confirmed that *Pike* is still good law, *Ross*'s divided outcome provided more noise than signal.

Pike has been shorthanded into a general balancing test. True enough. But *Pike* is best understood as establishing that the Commerce Clause forbids States from aggrandizing their own jurisdiction by "straitjacket[ing]" a "company with respect to the allocation of its interstate resources." 397 U.S. at 146.

In *Pike*, a governmental body in Arizona ordered a private cantaloupe company to build a $200,000 packing plant to force that enterprise under the jurisdiction of an Arizona food labeling law. Why? So the (evidently) remarkably delicious cantaloupes

could be labeled as an Arizona product and "enhanc[e] the reputation of other producers within [Arizona's] borders." *Id*. at 144–46 (discussing "superior" and "exceptionally high quality" cantaloupes at issue). This Court correctly squashed that argument under the dormant Commerce Clause. *Id*. at 146.

In short, when a State has no interest other than bragging rights, it's not permitted to force an out-of-state company to establish a larger legal presence. Yet that's exactly what's going on here. When a Pennsylvania court weighs in on a case with no Pennsylvania party and no Pennsylvania harm, it's just aggrandizing the Commonwealth's judiciary at the expense of other States with an actual, rooted interest in the controversy. At best, perhaps Pennsylvania could use its universal jurisdiction statute to obtain a reputation as the premier State in the country for plaintiffs to file suit—but that's precisely the aggrandizement that *Pike* and the Commerce Clause forbid.

The Court should take this case to restore certainty to *Pike*'s application as a bulwark defending "the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

ARGUMENT

I. THE COURT SHOULD GRANT THE WRIT TO FIX POST-*MALLORY* LEGAL UNCERTAINTY.

When Pennsylvania's long-arm statute was last before this Court, the majority rejected Norfolk Southern's Fourteenth Amendment claim on a 5–4 vote. But Justice Alito wrote separately to emphasize that the Court's rejection did not extinguish the last hope for Norfolk's case—as there is another route to end this saga: the dormant implications of the Commerce Clause. Justice Alito is right—and the Court should take this case so it may bring balance to our form of government and provide the Nation's going concerns with a pathway to sell their wares without taking on undue litigation risk.

Thanks to the internet, companies can easily scale across the Nation—but firms dependent on shipping goods to consumers in the fifty States can't cheaply ramp up trial capacity for all possible litigation at the same scale. Pet. 9–10. And so it's the rational play for many enterprises to simply "not enter an out-of-state market 'due to the increased risk of remote litigation.'" *Id*. at 10 (quoting *Mallory*, 600 U.S. at 162 (Alito, J., concurring)). The losers? The deprived American consumers who find themselves living in the plaintiff's bar's preferred territories. *Mallory*, 600 U.S. at 153–54 (2023) (Alito, J., concurring) ("[I]t is hard to see Mallory's decision to sue in Philadelphia as anything other than the selection of a venue that is reputed to be especially favorable to tort plaintiffs").

Maybe that's just the price of federalism. After all, *Mallory*'s bare majority found no due process issue when a State "require[s] out-of-state corporations to consent to in-state suits in exchange for the rights to exploit the local market and to receive the full range of benefits enjoyed by in-state corporations." 600 U.S. at 130; *but see infra* at 9–12 (consent-by-registration violates the Commerce Clause). Let's suppose that's so. A company can strike that bargain only where the terms of the deal are known *ex ante*—it's "[a] fundamental principle in our legal system . . . that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

Pennsylvania, to its (limited) credit, puts its cards on the table upfront. Its long-arm statute plainly states that registration to do business in the Commonwealth comes with the burden of "general personal jurisdiction." 42 Pa. Stat. § 5301(a)(2)(i). But other States aren't making that offer upfront. For example, Minnesota's business registration requirement is silent on personal jurisdiction. Minn. Stat. §§ 303.06; 303.13. But the State's court of appeals—relying on *Mallory*—has repeatedly determined that "'it is *immaterial* that section 303.06 does not explicitly'" alert a registrant to the bargain. *Minn. v. Am. Petroleum Inst.*, 2026 WL 192130 at *3–4 (Minn. Ct. App. Jan. 26, 2026) (quoting *Lynn v. BNSF*, 2025 WL 1860488 at *3 (Minn. Ct. App. July 7, 2025)) (emphasis supplied); *PDII, LLC v. Sky Aircraft Maint., LLC*, 925 S.E.2d 28, 36 (N.C. Ct. App. 2025) (holding similar); *stayed* 924 S.E.2d 34 (N.C. 2026). Implied consent offers no security for an

entrepreneur trying to navigate the risks and rewards of expanding her business.

This is especially so because every State hasn't followed that silence-is-consent standard. *E.g.*, *Kelchner*, 29 N.W.3d at 319; *Ormand-Ward v. Litt*, 926 S.E.2d 259, 267 (S.C. Ct. App. 2025); *Repairify, Inc. v. Opus IVS, Inc.*, 2024 WL 2205663, at *1 (Tex. App. May 16, 2024); *K&C Logistics, LLC v. Old Dominion Freight Line, Inc.*, 374 So.3d 515, 528 (Miss. 2023). That's good policy with a significant downside: the resulting patchwork means that in large swathes of the Nation, it's just not possible for a company to structure its business to safely avoid all-purpose jurisdiction based on what the statutes say. The problem is most acute in Connecticut, where federal and state tribunals can't agree. *Compare O'Leary*, 2025 WL 2701908 at *4 (finding implied consent to jurisdiction) *with Sociedad Concesionaria Metropolitana Du Salud*, 2026 WL 84524 at *6 (holding the opposite).

Unless this Court intervenes now to end consent-by-registration personal jurisdiction, every State's rule must be sorted out through costly litigation "without any legally fixed standards." *Beckles v. United States*, 580 U.S. 256, 266 (2017). While that chaos unfolds, beneficial economic activity will be stifled as legal uncertainty chills free enterprise. "Businesspeople crave certainty as much as almost anything: certainty is what allows them to make long-term plans and long-term investments." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 258 (2018).

And this uncertain legal landscape won't just swallow domestic concerns—foreign corporations must also navigate this legal thicket. Company general counsel, compliance personnel, and single-person enterprises—American and non-American alike—all "must necessarily guess at" a state law's "meaning and differ as to its application." *Connally v. Gen'l Constr. Co.*, 269 U.S. 385, 391 (1926). This is intolerable and it should end.

II. THE COURT SHOULD TAKE THIS CASE TO CLARIFY *PIKE V. BRUCE CHURCH*.

In *National Pork Producers Council v. Ross*, a sharply divided Court determined that state regulation may have extraterritorial effect without crashing into the negative implications of Congress's commerce power. But the Court mumbled through its application of *Pike v. Bruce Church*. So now *Pike*'s relevance outside of its "heartland" use as a hack to reveal submerged state protectionism is uncertain at best. *Ross*, 598 U.S. at 379–80; *id*. at 403 (Kavanaugh, J., concurring in part and dissenting in part) ("Parts IV-B and IV-D of Justice Gorsuch's opinion would essentially overrule the *Pike* balancing test, those subsections are not controlling precedent").

Seven justices re-affirmed *Pike*'s utility—even as they disagreed on its application. *Id*. at 393 (Sotomayor and Kagan, JJ., concurring) (complaint failed to state the "threshold requirement" of a *Pike* claim); *id*. at 393–94 (Barrett, J., concurring) (*Pike* claim properly pled, but defeated because "the benefits and burdens of Proposition 12 are incommensurable"); *id*. at 400 (Roberts, C.J. and Alito, Kavanaugh, and Jackson, JJ. dissenting)

("[S]weeping extraterritorial effects" are "pertinent in applying *Pike*").

Pike is often shorthanded into a crude balancing standard, which functions like First Amendment underbreadth—if a law singles out out-of-staters in an unusual way, it hints at an improper discriminatory motive. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–392 (1992) (reviewing statute's "practical operation"). But *Pike* isn't just about testing the scales for discrimination. *Pike* established that the Commerce Clause forbids a State from aggrandizing its own jurisdiction to "straitjacket" a "company with respect to the allocation of its interstate resources." 397 U.S. at 146.

Loren J. Pike was the supervisor of inspection for the Arizona Fruit and Vegetable Standardization Service. In that capacity, he ordered a cantaloupe company "to build packing facilities in or near Parker, Arizona that would take many months to construct and would cost approximately $200,000." *Id.* at 140. Why? "[S]olely for the sake of enhancing the reputation of other producers within its borders." *Id.* at 146. Once the packing took place in Arizona, those cantaloupes fell under the jurisdiction of an Arizona labeling law that would compel the company to say its "exceptionally high quality" cantaloupes were an Arizona product. *Id.* at 144. Pike believed this would have a knock-on effect for other Arizona cantaloupe firms—boosting the State's melon-mongers.

The *Pike* Court was scarcely convinced that bringing a firm within a State's legal scheme for bragging rights was a legitimate state interest. *Id.* at 145. So the Court swiftly held that this forced

$200,000 expenditure—which, presumably, could have been defeated only by the targeted firm's quitting Arizona entirely—unconstitutionally "straitjacketed" the private firm's "allocation of its interstate resources." *Id.* at 146 (tense altered).

While this case is about workplace exposure and courts, not cantaloupes and compelled speech, the same straitjacketing is afoot here. The Commonwealth's assertion of universal jurisdiction isn't furthering any state interest in protecting its own residents—torts involving Pennsylvanians or hazards occurring in the Commonwealth would find a natural home in its courtrooms. In fact, by encouraging out-of-staters to litigate out-of-state claims in its tribunals, Pennsylvania is plausibly delaying justice for its own residents by clogging court dockets with those claims.

Maybe there's some negligible economic benefit to teleporting these out-of-state cases to Pennsylvania in the form of extra filing fees, more hiring of local counsel to appear on papers, or creating a need for food and lodging for out-of-state counsel and witnesses. But that can't be worth the federalism candle of inserting Pennsylvania judges and juries in-between Virginians and Georgians. Especially because the costs of litigation for the out-of-state defendant will always vastly outweigh any nebulous in-state benefit in "dollars and cents." *Ross*, 598 U.S. at 393 (Barrett, J., concurring).

At best, Pennsylvania could acquire and then cultivate a reputation as a good forum in which to litigate certain types of cases. *Mallory*, 600 U.S. at 153–54 (2023) (Alito, J., concurring); Douglas G.

Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. Davis L. Rev. 1613, 1621 (2008) ("[Mass tort] claims have gravitated toward certain jurisdictions that plaintiffs believe are more favorable").

But *Pike* is plain: aggrandizing a State's reputation vis-à-vis other members of the Union can't justify compelling unwanted adherence to a state law or a larger legal presence within the State. That underlying principle—lost in the "fractured" nature of the *Ross* opinions—should be reclaimed and reasserted. 598 U.S. at 391 (Sotomayor and Kagan, JJ., concurring); *id.* at 403 (Kavanaugh, J., concurring in part and dissenting in part). And this is the ideal vehicle in which to do so.

CONCLUSION

Consent-by-registration is wrecking both business certainty and the Commerce Clause. The Court should grant the writ to fix this.

Respectfully submitted,

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